IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO._____

WILLIAM ANDERSON,

Petitioner,

v.

THE CITY OF PHOENIX, a municipal corporation and RUFUS C. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

The petitioner, WILLIAM ANDERSON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of

Arizona entered on September 13, 1972 after denial of rehearing.

OPINION BELOW

The opinion of the Arizona Supreme Court is reported at ___ Ariz. ___, 499 P.2d 103 (1972) and appears in Appendix A hereto. That court's mandate and the order denying petitioner's motion for rehearing appear in Appendix B. The opinion of the Arizona Court of Appeals which was reversed by the Arizona Supreme Court appears at 16 Ariz. App. 27, 490 P.2d 856 (1971) and in Appendix C. The ruling of the Superior Court of the State of Arizona is unreported and appears in Appendix D.

JURISDICTION

The decision of the Arizona Supreme Court was entered on June 29, 1972. A timely motion for rehearing was filed and later denied on September 12, 1972. The mandate of the Arizona Supreme Court issued on September 13, 1972. This petition for certiorari was filed within 90 days of September 12, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) because rights, privileges and immunities under the Constitution are claimed by petitioner.

The decision below is a final judgment of the state's highest court on an extraordiary writ. The finality and reviewability of the judgment is discussed briefly in a separate section following the Statement of the Case because it is more easily understood in that sequence.

QUESTION PRESENTED

By exhibiting an allegedly obscene film to the public, does a person waive his privilege against self-incrimination in regard to the film when subsequently subpoenaed to produce it in court?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Fifth Amendment

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

Fourteenth Amendment

> Nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

The City of Phoenix filed a complaint against petitioner in the Superior Court of the State of Arizona requesting that a certain film which petitioner was alleged to have been exhibiting be adjudicated obscene, that further exhibition of the film be enjoined and that the petitioner be ordered to surrender it to the City of Phoenix for possible criminal prosecution. The City's complaint appears in Appendix E. In addition, the petitioner was served with a subpoena duces tecum requiring him to produce the film in court.

At the hearing, petitioner orally moved to quash the subpoena based upon the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The Superior Court judge ruled that the privilege did not apply, denied the motion,

and ordered the film produced. The petitioner's motion and the court's order are reflected in the minutes of the Superior Court which appear in Appendix D hereto.

Petitioner filed a Writ of Prohibition (now called Special Action in Arizona) in the Arizona Court of Appeals asking that the Superior Court be prohibited from requiring petitioner to produce the film.

The Arizona Court of Appeals accepted jurisdiction of the Special Action, ruled that petitioner was entitled to invoke the privilege and that if the film was taken from him over his Fifth Amendment objection, he would be immune from criminal prosecution. *Anderson v. Coulter*, 16 Ariz. App. 27, 490 P.2d 856 (1971). That decision appears in Appendix C hereto.

The Arizona Supreme Court granted the City's petition for review and reversed the Arizona Court of Appeals, holding that anyone who exhibits an allegedly obscene

and ordered the film produced. The petitioner's motion and the court's order are reflected in the minutes of the Superior Court which appear in Appendix B hereto.

Petitioner filed a Writ of Prohibition in the Arizona Court of Appeals seeking that the Superior Court be prohibited from requiring petitioner to produce the film.

film, by that act, waives his privilege against self-incrimination when subpoenaed to produce the film if the film can be identified by the prosecution. *Anderson v. Coulter*, ___ Ariz. ___, 499 P.2d 103 (1972) and Appendix A hereto.

FINALITY OF THE JUDGMENT BELOW

The decision below is a ruling on a Writ of Prohibition (now called a Special Action in Arizona) brought in relation to a pending lawsuit. Accordingly, it may be claimed by respondents that finality is lacking, that in order to properly achieve it petitioner must now refuse to surrender the film at the trial level based upon his privilege against self-incrimination and then appeal his punishment for contempt through the Arizona courts. This would be a meaningless ride on the same track because the Arizona Supreme Court's decision on

film, by that act, waives his privilege against self-incrimination when subpoenaed to produce the film if the film can be identified by the prosecution. Anderson v. Cowlter, ___ Ariz. ___, 497 P.2d 101 (1972) and Appendix A hereto.

the extraordinary writ has conclusively resolved the self-incrimination issue and all other issues in the case. The only other issue ever involved besides surrender of the film for possible criminal prosecution concerned the City's request at the trial level for an order enjoining its public exhibition. That matter was conclusively resolved at the very beginning of the case by petitioner's stipulation and the Superior Court's order based upon that stipulation that public exhibition be enjoined. See Appendix D. The stipulation thus left only one issue - whether the film must be produced for use in criminal prosecution.

This Court has held that a final decision of a State's highest court on an extraordinary writ that is a separate and distinct suit brought in relation to another pending lawsuit is a final judgment reviewable under 28 U.S.C. 1257 particularly when it conclusively disposes of the

rights of the petitioner. *Madruga v. Superior Court*, 346 U.S. 556, 557, n. 1 (1954); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 565 (1947); *Pacific Coast Dairy, Inc. v. Dept. of Agriculture of Calif.*, 318 U.S. 285 (1943); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931); *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63 (1928).

Even in situations where a separate and distinct extraordinary writ is not involved, the court has accepted review if the issue is effectively resolved even though various formal procedures remain. In *Mills v. Alabama*, 384 U.S. 214 (1966) the state trial court sustained a demurrer to a criminal charge finding that the statute involved abridged free speech. That order was reversed and remanded by the state supreme court with instructions to proceed with the trial. While recognizing the state supreme court's decision

was technically not a final one, the Court found that because the only real issue in the case was the constitutionality of the statute (the petitioner admitted violating the statute) the state supreme court's judgment effectively resolved the case and compelled the trial court to convict the petitioner. Finding the case reviewable, the Court held that "no more than a few formal gestures leading inexorably towards a conviction" were required. 384 U.S. at 217.

In *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971) review by certiorari was sought of a temporary injunction. The Court granted the writ because there was no indication that a further hearing would change the decision of the court below and because, as in this case, First Amendment rights were involved. 402 U.S. 418, n. 1.

These decisions are apropos here.

Since the only issue left is whether the film must be surrendered for criminal prosecution, the Arizona Supreme Court's opinion certainly inexorably commands petitioner's incarceration for contempt if he continues to stand on his Fifth Amendment claim. Carrying through with the matter in the trial court and proceeding again through the Arizona appellate system would be mere formal gestures ultimately affording nothing more than what now exists - a ruling of the state's highest court that the privilege is waived by exhibiting the film to the public.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES NEW AND SUBSTANTIAL QUESTIONS CONCERNING THE EXTENT OF THE PRIVILEGE AGAINST SELF-INCRIMINATION. IT SUBSTANTIALLY ERODES THE PRIVILEGE BY CREATING AN ENTIRELY NEW MEANS BY WHICH IT MAY BE WAIVED. IT PROSPECTIVELY TRANSFORMS TRADITIONAL BURDENS IN LAW ENFORCEMENT AND IS INCONSISTENT IN PRINCIPLE WITH A NUMBER OF DECISIONS OF THE UNITED STATES SUPREME COURT.

A. The Decision Below Conflicts In Principle With Decisions Of This Court Holding That One Constitutional Right Cannot Be Surrendered By The Exercise Of Another.

Under the decision below, one relinquishes his Fifth Amendment privilege against self-incrimination by exercising his First Amendment rights. This is contrary to holdings of the Court that one constitutional right cannot be surrendered as a penalty for asserting another. *U.S. v. Jackson*, 390 U.S. 570, 581 (1968); *Simmons v. United States*, 390 U.S. 377, 394 (1968). The exercise of First Amendment rights cannot be conditioned upon payment

of a price. *Perry v. Sinderman*, 92 S. Ct. 2694, 2697 (1972); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Thomas v. Collins*, 323 U.S. 516 (1945).

In *Smith v. California*, 361 U.S. 147 (1959) it was held that an obscenity ordinance permitting conviction without proof of the bookseller's scienter was unconstitutional. The Court reasoned that the ordinance's strict liability feature caused bookseller's to limit the materials they sold to those they had inspected, thereby effecting a depletion in the amount of materials that could be offered for sale, resulting in a limitation of the public's access to non-obscene as well as obscene books. 361 U.S. at 153.

The prospective loss of Fifth Amendment rights occasioned by the ruling of the court below, operates to make film exhibitors more reluctant to exercise their First Amendment rights. This type

of coercion on the exhibitor and his resultant timidity in deciding what to exhibit, ultimately restricts the public's access to materials much as did the ordinance in question in *Smith*. The Court has held as unconstitutional any rule of law which compels an effort to "steer far wider of the unlawful zone" in the exercise of First Amendment rights. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

B. The Decision Below Raises Substantial Questions About The Extent To Which Prosecutors May Abrogate Their Historic Duty To Shoulder The State's Burden Of Proof And Instead Rely On Evidence Extracted From The Accused By Force Of Law. It Prospectively Permits A Finding Of Waiver In Many Types Of Cases Other Than Obscenity.

Embedded in constitutional law is the principle that the state should shoulder the entire load of proving a defendant's guilt. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Murphy v. Waterfront Commission*,

378 U.S. 52, 55 (1964). The roots of the doctrine are the expression of fundamental principles of fair play and decency and the abhorrence of any scheme that forces a man to aid in the proof of his own guilt. *Aiuppa v. United States*, 201 F.2d 287, 300 (6th Cir. 1952); Griswold, *The Fifth Amendment*, 40 A.B.A.J. 502, 503 (1954).

The decision below, in effect, requires the accused to supply the state's entire proof, much the same as would a subpoena requiring an accused to produce heroin in a narcotics case. It permits the prosecution to whipsaw the accused between furnishing the evidence necessary to convict himself and being punished for contempt for failure to do so. The dilemma thus posed is considered an invasion of personal dignity and inherently degrading. *Brown v. Walker*, 161 U.S. 591, 637 (1895) (dissenting opinion of Field J.); McCormick on *Evidence*, § 118, pages 252-

253 (2nd Ed. 1972).

The decision below furnishes no meaningful reason why if public exhibition of the film waives the privilege with respect to production of it in court, it does not also serve to waive it with respect to testimony. Industrious prosecutors can now reasonably argue that since the privilege is gone, the accused may be called to the witness stand.

The decision below prospectively transforms traditional methods of prosecution in innumerable cases besides obscenity. If a defendant is accused of the crime of using vulgar language in public, the doctrine of "public exhibition waiver" can theoretically force him to the witness stand for cross-examination about the language he used. It might have forced the defendant in *Cohen v. California*, 403 U.S. 15 (1971) to bring to court the sign sewn on his jacket because it was exhibited to

253 (2nd Ed. 1972).

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the public. It seems capable of being applied to force armed robbery defendants to produce the gun used and the money taken if they were exhibited before a number of witnesses. Any number of crimes have public overtones sufficient to permit zealous prosecutors to rationally argue that the privilege has been waived.

C. The Decision Below Conflicts In Principle With Previous Holdings Of This Court That Waivers Of Constitutional Rights Must Be Made Intelligently And With Full Knowledge.

Since the state's action does not arise until after the film has been exhibited, the privilege is deemed waived before the exhibitor is aware of the existence of an action questioning the obscenity of the film and before he is aware of the state's intention to make him a witness. This is inconsistent in principle with rulings of the Court that a waiver of fundamental constitutional rights can be made only with full knowledge of the

rights to be waived. *Barker v. Wingo*, 407 U.S. 514, 525 (1972); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Necessarily implicit in the decision below is that the waiver is irrevocable; that once the film is exhibited Fifth Amendment rights are lost forever. This conflicts in principle with the ruling of the Court that a waiver of the privilege against self-incrimination may be withdrawn any time prior to the giving of the evidence. *Stevens v. Marks*, 383 U.S. 234 (1966).

The decision is also inconsistent in principle with the Court's decision that testifying about certain matters in a preliminary hearing does not waive the privilege at a later trial. *Murphy v. Waterfront Commission*, 378 U.S. 52, 54, n. 3 (1964). Testifying in open court is certainly a public act.

D. **The Decision Below Conflicts With Rulings Of The Court Holding That The Decision To Testify Should Be Unfettered By Compulsion And That No Penalty May Be Imposed For Remaining Silent.**

Under the decision below, in order to avoid punishment for contempt for failure to produce the film, the defendant must take the stand and tell the court that he did not publicly exhibit it and thus did not waive his Fifth Amendment privilege. Therefore, in order to prevent the operation of the court's contempt powers against him, he is under compulsion to testify about his part in the crime itself (publicly exhibiting an obscene film) and submit himself to cross-examination in regard thereto. If he chooses to remain silent, he is penalized by the loss of his Fifth Amendment privilege. This conflicts with decisions of the Court holding that the decision to testify should be unfettered by compulsion and remaining silent must

D. The Decision Below Conflicts With Rulings Of The Court Holding That The Decision To Testify Should Be Untethered By Compulsion And That No Penalty May Be Imposed For Remaining Silent.

Under the decision below, in order to avoid punishment for contempt for failure to produce the film, the defendant must take the stand and tell the court that he did not possibly exhibit it and thus did not waive his fifth Amendment privilege. Therefore, in order to prevent the operation of the court's contempt powers against him, he is under compulsion to testify about his part in the crime itself [particularly containing an element [illegible] which himself to [illegible] in regard thereto. [illegible] be [illegible] by the [illegible] Amendment privilege. This conflicts with decisions of the Court holding that the decision to testify should be untethered by [illegible] which might [illegible]

not be costly. *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967); *Spevack v. Klein*, 385 U.S. 511, 514, 515 (1967)(opinion of Douglas J.); *Griffin v. California*, 380 U.S. 609, 614 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

CONCLUSION

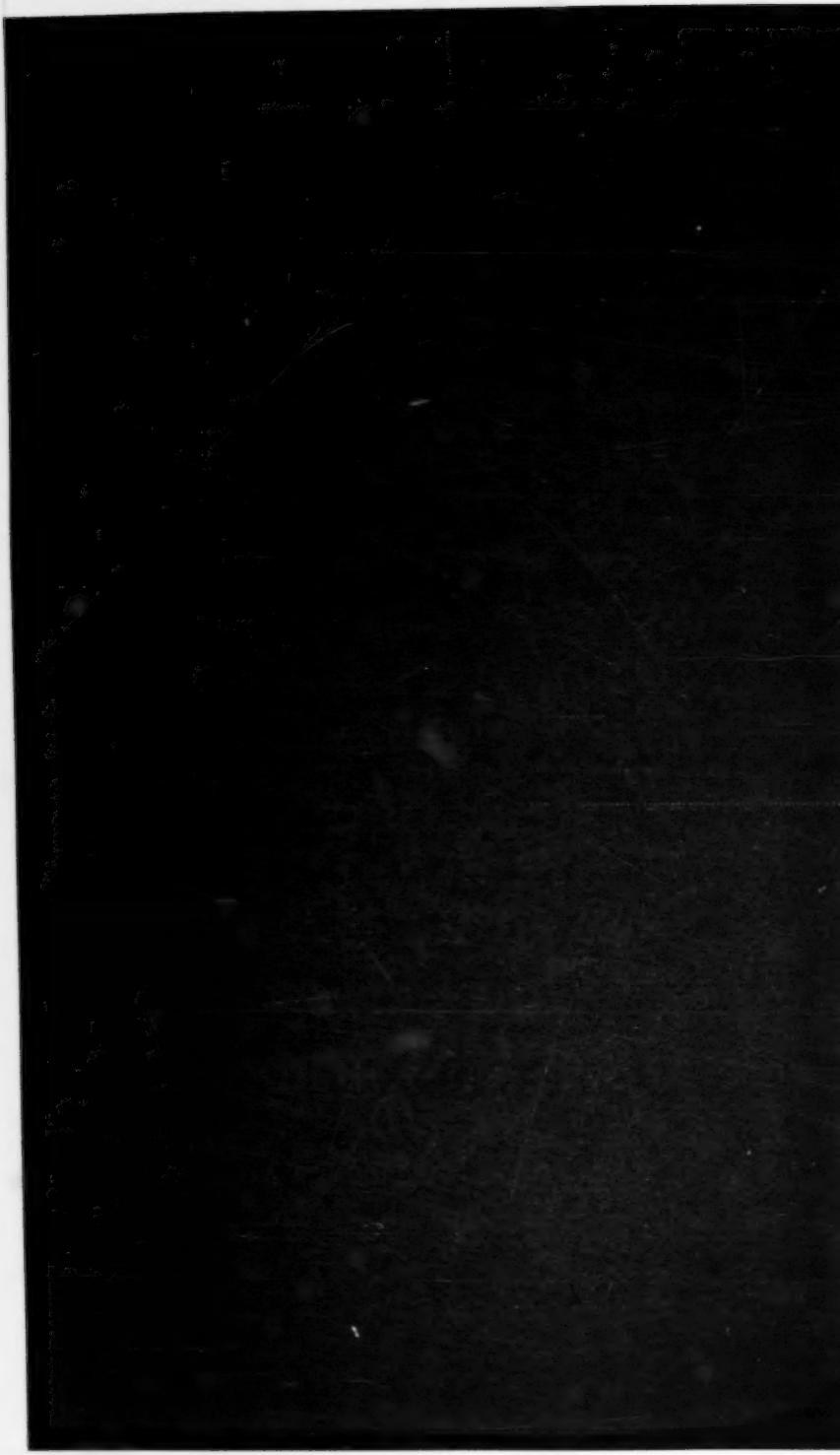
Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment of the Arizona Supreme Court and this Court should rule that the privilege against self-incrimination cannot be waived by exhibiting a film to the public.

Respectfully submitted,

/s/ Richard J. Hertzberg

Richard J. Hertzberg
Attorney for Petitioner

APPENDIX



APPENDIX A

Opinion of the Supreme Court

of Arizona

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

WILLIAM ANDERSON, Petitioner, v. THE HONORABLE RUFUS C. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona, Respondent, and THE CITY OF PHOENIX, a municipal corporation, Real Party In Interest.	No. 10721-PR

Appeal from the Superior Court
of Maricopa County

Cause No. C-249138

The Honorable Rufus C. Coulter, Jr., Judge

JUDGMENT AFFIRMED

- -

Opinion of the Court of Appeals, Division One
16 Ariz. App. 27, 490 P.2d 856 (1971) VACATED

Opinion of the Supreme Court

of Arizona

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

WILLIAM ANDERSON,

Petitioner,

v.

THE HONORABLE MARIS G. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona,

Respondent,

and

THE CITY OF PHOENIX, a municipal corporation,

Real Party in Interest.

No. 10721-PR

Richard J. Hertzberg Phoenix
Attorney for Petitioner

Joe R. Purcell, City Attorney of Phoenix By John A. LaSota, Jr., Assistant City Attorney Phoenix
Attorneys for Respondent and
Real Party In Interest

CAMERON, Vice Chief Justice

We granted the petition of the City Phoenix to review a decision and opinion of the Court of Appeals which set aside the order of the Superior Court of Maricopa County denying the motion of the respondent-defendant, William Anderson, to quash a subpoena duces tecum in an obscenity action.

The question before us is as follows: In an obscenity case prior adversary hearing, may the defendant claim the privilege against self-incrimination when asked to produce a film which has been previously shown to the public and the existence and

Richard O. Hertzberg — Phoenix
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Phoenix By John A. LaSota, Jr.,
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Attorneys for Respondent and
Real Party In Interest

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The question before us is as follows: In an obscenity case prior adversary hearing, may the defendant claim the privilege against self-incrimination when asked to produce a film which has been previously shown to the public and the existence and

identity of which have been adequately established by the prosecution?

The facts necessary for a determination of this matter are as follows. On 8 June 1971 the City of Phoenix filed a complaint alleging that the defendant was operating a movie theater in Phoenix and on or about 26 May 1971 exhibited an obscene movie in violation of § 13-532 (2) A.R.S. The City asked for a hearing to determine why a preliminary injunction should not issue against further showing of the movie. On 9 June a subpoena duces tecum was served on the defendant, ordering him to bring the movie in question with him to a hearing. The subpoena duces tecum described the film as "* * * the motion picture presently being shown in Moviematic Machine #9 at the Ellwest Stereo Theatre at the above stated location," and then described in detail the plot of the film as well as the performers

identity of which have been adequately es-

tablished by the prosecution?

The facts necessary for a determina-

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with him to a hearing. The subpoena duces

tecum does not list the film as "A * * the

motion picture presently being shown in

Maricopa County at the Movie at

Phoenix, Arizona" as the above stated issue

is, and then described in detail the

[illegible]

therein. The defendant made a motion to quash the subpoena duces tecum, based on his privilege against self-incrimination as set forth in the Fifth Amendment to the United States Constitution and Article II, Section 10 of the Arizona Constitution. The Superior Court ruled against the self-incrimination argument and denied the motion to quash the subpoena duces tecum. The court further ordered that the defendant be enjoined from showing the movie and that the matter be continued until 13 August.

Defendant filed a petition for special action in the Court of Appeals, Division One, and that court accepted jurisdiction. See Anderson v. Coulter and the City of Phoenix, 16 Ariz.App. 27, 490 P.2d 856 (1971). While reasoning that requiring the production of the film would violate defendant's privilege against self-incrimination if it were not for the criminal immunity statute, § 13-1804 A.R.S.,

the Court of Appeals held that the City could enforce the subpoena and continue its action for an injunction against future showings, but that defendant would be entitled to criminal immunity for past showings.

Insofar as the Court of Appeals has held that the film must be produced and that the future showings could be enjoined, we agree. We also agree with Judge Stevens' opinion that the testimonial immunity given a witness by virtue of the privilege against self-incrimination may extend to documents and chattels. See 8 Wigmore On Evidence, § 2264, McNaughton Rev. Edition, 1961; 4 Jones On Evidence 1609, § 857. We would further agree with the Court of Appeals that if the privilege applied in the instant case, immunity from criminal prosecution could be granted to the defendant while at the same time allowing the court to enjoin future showing of

the film in question based upon a viewing of the film required to be produced.

We do not agree, however, that the immunity statute applies to the facts in this case.

Motion pictures are forms of expression protected by the First Amendment. Burstyn v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). The First Amendment to the United States Constitution does not protect obscenity as such, Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), but the United States Supreme Court as well as other courts have been very careful in obscenity cases to prevent any abridgment of the right of free people in a free society to the unobstructed expression and dissemination of non-obscene matters and to keep them free of prior restraint. It is for this reason that the Supreme Court has insisted that there be a "prior adversary

the film in question based upon a viewing
of the film required to be produced.

We do not agree, however, that the
immunity statute applies to the facts in
this case.

hearing" whenever any attempt is made to seize an allegedly obscene film. Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), but see Roaden v. Kentucky, 473 S.W.2d 814 (1971), cert. granted, No. 71-1134, 11 CrL 4023. At the prior adversary hearing, if the court determines, on the basis of a federal constitutional standard, that the film is entitled to the protection of the First Amendment, then that usually ends the matter. NGC Theatre Corp. v. Mummert, 107 Ariz. 484, 489 P.2d 823 (1971). This is not a protection enjoyed by citizens engaged in non-First Amendment matters. For them a search warrant may be issued and their illicit or contraband merchandise seized and held for trial on the issue.

Admittedly, the seizure of an obscene film can be sustained without the film as evidence:

"In our view appellants' fears (and those of the court of appeal) are groundless. So far as the Fourth Amendment is concerned, probable cause can be shown as it always has been shown -- ex parte and, without recourse to the film itself, by a showing of obscenity through use of affidavits, testimony, or still photographs, such as was made here. All that Books requires in deference to the First Amendment is that before seizure a prior adversary hearing be afforded. Should the film exhibitors, on hearing, choose not to produce the film to rebut the showing of probable cause and should an order for seizure follow they would have waived any right to complain that the magistrate had failed to consider the film as a whole. Should the film exhibitors choose not to avail themselves of the opportunity afforded them for a hearing, they would effectively have waived their First Amendment rights and execution of a warrant for seizure forthwith would be entirely proper." Demich, Inc. v. Ferdon, 426 F.2d 643, 646 (9th Cir. 1970), vacated on other grounds, 401 U.S. 990, 28 L.Ed.2d 528, 91 S.Ct. 1223 (1971).

The fact remains, however, that obscene motion pictures present a particularly difficult problem for the prosecution. Even though the film was not necessary for the prior adversary hearing, it is

"In our view appellants' fears (and those of the court of appeal) are groundless. So far as the Fourth Amendment is concerned, probable cause can be shown as it always has been shown -- ex parte and, without recourse to the film itself, by a showing of obscenity through use of affidavits, testimony, or still photographs, such as was made here. All that Books requires is deference to the first Amendment is that before seizure a prior adversary hearing be afforded. Should the film exhibitors, on hearing, choose not to produce the film to rebut the showing of probable cause and should an order for seizure follow they would have waived any right to contain that the magistrate had failed to consider the film as a whole. Should the film exhibitors choose not to avail themselves of the opportunity afforded them for a hearing, they would effectively have waived their First Amendment rights and exhibition of a warrant for seizure forthwith would be entirely proper."

certainly the best evidence as to whether the film is obscene. Both the prosecution and the trier of fact are aided in having the film present and viewable before the film is seized. The problem of this necessity and the privilege against self-incrimination were recognized by the California court:

> "If the rule argued for by De Renzy be the law, then California's law enforcement authorities, under circumstances as here exist, are faced with a curious dilemma. They are permitted by the state and federal Constitutions, and directed by statute, to enforce the state's obscenity laws. On the other hand they may not seize alleged obscene material, even under a search warrant, without a prior adversary proceeding. Any court process designed to compel production of the questioned material would obviously impinge upon the possessor's Fifth Amendment rights. (See Boyd v. United States, 116 U.S. 616, 634-635, 6 S.Ct. 524, 29 L.Ed. 746.) Thus, although seizure of obscene material is conditioned upon a prior adversary hearing, the state would be without power to produce the evidence essential to that hearing. This result if unreasonable and should be avoided." People v. De Renzy, 275 C.A.2d 380, 79 Cal. Rptr. 777, 779 (1969).

-

We believe that reliance upon the Fifth Amendment to prevent the production of a film that has been previously exhibited to the public is misplaced. Having the protection of the First Amendment and asserting it as the defendant does here, it seems to us both illogical and irrational to say, particularly where the item has been exhibited to the public, that the defendant may then rely upon the privilege against self-incrimination to refuse to produce the film at the prior adversary hearing.

We agree with Justice Traynor concerning the extent of the testimonial privilige:

> "* * * When the prosecution has ample evidence of the existence, identity, and authenticity of documents in the defendant's possession and thus does not need to rely on his knowledge to locate and to identify them or on his testimony to authenticate them, it may be that his implied admission alone that the documents produced were those he was ordered to

We believe that reliance upon the Fifth Amendment to prevent the production of a film that has been previously exhibited to the public is misplaced. Having the protection of the First Amendment and asserting it as the defendant does here, it seems to us both illogical and irrational to say, particularly where the item has been exhibited to the public, that the defendant may then rely upon the privilege against self-incrimination to refuse to produce the film at the prior adversary hearing.

We agree with Justice Traynor concerning the extent of the testimonial privi-

> produce would involve too trivial a degree of incrimination to justify invoking the privilege. (See Maguire, Evidence of Guilt pp. 22-23; Meltzer, Required Records , The McCarran Act, and the Privilege Against Self-Incrimination, 18 U.Chi.L.Rev. 687, 699-701.) * * *." Jones v. Superior Court of Nevada County, 22 Cal. Rptr. 879, 372 P.2d 919, 921 (1962).

In this case, the prosecution's "ample evidence" of the "existence, identity, and authenticity" of the movie was expressly shown in the subpoena duces tecum. It is obvious that the prosecution had everything it needed to identify the film and compliance with the subpoena duces tecum did no more than produce the film already known by both the prosecution and the court to exist.

We believe that a person who exhibits to the public an allegedly obscene film has, by that showing, waived his right to claim his privilege against self-incrimination when subpoenaed to produce the film at the prior adversary hearing, provided

the prosecution has properly identified the film to be produced.

We therefore hold that the defendant, in the instant case, may not claim the privilege against self-incrimination.

JAMES DUKE CAMERON,
Vice Chief Justice

CONCURRING:

JACK D. H. HAYS
Chief Justice

LORNA E. LOCKWOOD
Justice

FRED C. STRUCKMEYER, Jr. Justice

WILLIAM A. HOLOHAN
Justice

APPENDIX B

Mandate of the Arizona Supreme Court

IN THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable the Superior
Court of the State of Arizona
in and for the County of
MARICOPA

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of MARICOPA, before you in a cause between

CITY OF PHOENIX, a municipal corporation,

Petitioner,

v.

ELLWEST STEREO THEATRES, INC., an Arizona corporation, and JOHN DOE I, II and III,

Respondents.

Cause No. C 249138

APPENDIX B

Mandate of the Arizona Supreme Court

IN THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable the Superior
Court of the State of Arizona
in and for the County of _____
MARICOPA

QUESTION:

Whether, lately in the Superior Court of the State of Arizona in and for the County of MARICOPA, before you in a cause between

City of PHOENIX, a municipal corporation,

Petitioner,

v.

EDWARDS & CRAIG TRAVERSE, INC., an Arizona corporation, and DOES I-X, XI and XII,

Respondents.

Cause No. C 164135

- 2013 -

said Superior Court entered its Order denying Defendant Anderson's Motion to Quash Subpoena Duces Tecum on the 29th day of June, 1971.

as by the inspection of the record of the said Superior Court, which was brought into the Court of Appeals, Division One, of the State of Arizona by virtue of a Special Action by William Anderson, agreeably to the law in such case made and provided fully and at large appears.

And Whereas, in July, in the year of our Lord one thousand nine hundred and seventy-one, the said cause came on to be heard before the said Court of Appeals, Division One, and was submitted for decision after argument of counsel. On Consideration Whereof, it was on the 16th day of November, in the year of our Lord one thousand nine hundred and seventy-one, ordered by said Court that the relief

prayed for in the [illegible], [illegible] Special Action is granted insofar as it relates to the ruling of the trial court as to the applicability of a Fifth Amendment privilege to the case at bar. The issuance of the mandate in relation to this opinion will constitute an order vacating the restraint heretofore imposed by this Court, and hereinbefore quoted, and will permit the trial court to proceed in a manner consistent with opinion.

Whereupon, on December 23, 1971, City of Phoenix filed a Petition for Review by the Supreme Court, on consideration of which the said Supreme Court, on January 11, 1972, ordered that the Petition for Review be granted. On Consideration Whereof, it was on the 29th day of June, 1972, ordered by this Court that the opinion of the Court of Appeals, Division One, is vacated, the judgment of the trial

court is affirmed. We hold that the defendant, in the instant case, may not claim the privilege against self-incrimination.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had. Witness, the Honorable JACK D. H. HAYS, Chief Justice of the Supreme Court of the State of Arizona, the Thirteenth day of September, in the year of our Lord one thousand nine hundred and seventy-two.

CLIFFORD H. WARD, Clerk

By /s/ Clifford Ward
Deputy Clerk of the Supreme Court of the State of Arizona

APPENDIX B

Order Denying Motion for Rehearing

SUPREME COURT

STATE OF ARIZONA

Phoenix

85007

September 13, 1972

WILLIAM ANDERSON, Petitioner, v. THE HONORABLE RUFUS C. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona, Respondent, and THE CITY OF PHOENIX, a municipal corporation, Real Party In Interest.	Supreme Court No. 10721-PR Court of Appeals No. 1 CA-CIV 1746 Maricopa County No. C 249138

The following action was taken by the Supreme Court of the State of Arizona on September 12, 1972 in regard to the

APPENDIX B

Order Denying Motion for Rehearing

above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Mandate issued this date.

CLIFFORD H. WARD, Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

APPENDIX C

Opinion of the Arizona Court of Appeals

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM ANDERSON, Petitioner, v. THE HONORABLE RUFUS C. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona, Respondent, and THE CITY OF PHOENIX, a municipal corporation, Real Party In Interest.	)	1 CA-CIV 1746 DEPARTMENT A

A special action in relation to
Maricopa County Superior Court
Cause No. C-249138

RELIEF GRANTED IN PART

Richard J. Hertzberg, Phoenix
Attorney for Petitioner

Joe R. Purcell
City Attorney of the City of Phoenix
By Alan S. Max, Richard M. Hannon
and John A. LaSota, Jr.
Assistant City Attorneys
Attorneys for Respondent and
for the Real Party In Interest

S T E V E N S, Presiding Judge

The questions involved in this special action are: First, whether the City of Phoenix may legally file a civil action in relation to allegedly pornographic matter and require the production thereof by a subpoena duces tecum in the face of a claimed Fifth Amendment right; and second, if it may do so, the effect of the immunity grant contained in A.R.S. § 13-1804. The questions here presented were not decided in the case of GO v. PETERSON, 14 Ariz. App. 12, 480 P.2d 35 (1971).

The facts necessary to place this

matter in perspective are as follows: On or about 8 June 1971, the City of Phoenix filed a civil complaint[1] against the petitioner and others to have a motion picture being exhibited commercially by petitioner declared obscene. The purpose of such a determination was to assist the respondent city in the prosecution of petitioner for an alleged violation of the Arizona Obscenity Statute, A.R.S. § 13-532. In conjunction with the filing of the above complaint, a subpoena duces tecum was directed to petitioner which ordered the production of the subject film for viewing by the respondent court.

Petitioner refused to produce the film and moved to quash the subpoena on the basis of the Fifth Amendment privilege against self-incrimination. This motion

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[1] Complaint and Petition For Adversary Hearing To Consider Question of Obscenity and Application for Preliminary and Permanent Injunction and Order to Show Cause.

was denied and on 29 June 1971 an order was issued which provided in pertinent part:

> "The Court finds that the provisions of the Fifth Amendment and the privilege against self-incrimination do not apply. IT IS FURTHER ORDERED denying Defendant Anderson's motion to quash subpoena duces tecum.
>
> "IT IS FURTHER ORDERED granting Plaintiff's motion to produce, and the Court requires that Defendant produce the film in question."

This Court entertained the special action which was filed subsequent to the issuance of the above order to determine whether such a procedure is statutorily or constitutionally permissible. At the conclusion of the informal presentation of the petition for special action this Court entered an order wherein it assumed jurisdiction and requested additional briefs. The order when entered provided in part, as follows:

was denied and on 29 June 1971 an order was issued which provided in pertinent part:

"The Court finds that the provisions of the Fifth Amendment and the privilege against self-incrimination do not apply.

IT IS FURTHER ORDERED denying Defendant Anderson's motion to quash subpoena duces tecum.

IT IS FURTHER ORDERED granting Plaintiff's motion to produce, and the Court requires that Defendant produce the film in question."

This Court entertained the special motion which was filed subsequent to the issuance of the above order to determine whether such a procedure is statutorily or constitutionally permissible. At the conclusion of the informal presentation of the petition for special motion this Court entered an order wherein it assumed jurisdiction and requested additional briefs. The order which entered provided in part as follows:

"IT IS FURTHER ORDERED, pending further order of this Court, that the Respondent Judge, be and is hereby enjoined and restrained from enforcing compliance with the subpoena duces tecum and from any action requiring the petitioner before the Court of Appeals to produce the film in question. * * *

"IT IS FURTHER ORDERED that this order, except as above set forth, is not a restraint upon further proceedings in relation to the adversary hearing in the above-numbered Superior Court matter."

This opinion resolves the issues framed by the special action.

Petitioner argues that A.R.S. § 13-1804,[2/] which provides that:

"If a witness in any judicial proceeding claims the privilege against self-incrimination but is required by the court to give testimony or produce evidence, the witness shall not be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he testifies or

---

2/ The statute under which this opinion is decided became effective on 11 July 1969. Subsequent to that date, the statute has been amended to include grand jury proceedings within the protection afforded effective 13 August 1971.

> produces evidence. The witness may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.";

prohibits the use of the film in question in a criminal prosecution against him if he produces such film pursuant to the order of the respondent court. It is the opinion of this Court that such a proposition is basically sound.

Arizona has, by constitution and statute, adopted a variety of laws intended to grant immunity and compel testimony in different situations. Udall, Arizona Law of Evidence § 99 (1960). With respect to at least two of these statutes in particular, our Supreme Court has adopted the view that such provisions are "self-executing," i.e., the immunity attaches and results whenever the witness gives the testimony, whether or not he was ordered to

testify after first refusing and claiming the privilege. STATE v. CHITWOOD, 73 Ariz. 314, 240 P.2d 1202 (1952). In this regard, it has been noted that whether a particular provision is "self-executing" or requires a specific claim of privilege and compulsion to bring it into action, will depend on the wording of the immunity law. Udall, Arizona Law of Evidence, supra at § 99, n. 54.

The immunity statute which is presently before this Court sets forth two requirements before its protection may be claimed by a witness. The witness must claim the privilege against self-incrimination and the court before which the witness is appearing must subsequently order the witness to give testimony or produce evidence. Petitioner was ordered to produce evidence which he claimed would violate his Fifth Amendment privilege against self-incrimination.

These facts when viewed in conjunction with A.R.S. § 13-1804 lead this Court to hold that the protection provided by the subject statute must by operation of law be granted to the petitioner should he produce the film in question pursuant to an order of the respondent court issued after the assertion of a Fifth Amendment privilege.

Should the petitioner fail to produce the evidence in question subsequent to an order by the respondent court to do so, it is the further holding of this Court that such inaction will render the petitioner subject to the enforcement provisions of A.R.S. § 13-1804 which provide for the prosecution of or the imposition of a penalty or forfeiture upon any witness who refuses to produce evidence pursuant to an order to do so subsequent to a claim of privilege. Where a witness claims the self-incrimination privilege but no

possibility of conviction or criminal liability exists, the design for which the privilege is created is not present and it is uniformly held that there is no privilege. Udall, Arizona Law of Evidence, at § 99. Similarly, a legislative provision providing amnesty for an individual offender who shall disclose the facts of an offense upon inquiry is effective to remove the criminality of the offense, and the privilege thereby ceases as to the person so disclosing. 8 Wigmore on Evidence § 2281 (McNaughten rev. 1961).

Our determination that the petitioner must comply with an order to produce an allegedly obscene film when he has been statutorily exempted from prosecution, penalty or forfeiture on the basis thereof is at least partially founded upon the conclusion that production of evidence pursuant to a subpoena duces tecum is in fact that type of testimonial compulsion

which is prohibited by the Fifth Amendment of the Federal Constitution and a similar provision of the Arizona State Constitution.

This Court has no doubt that the use of such process would have the same effect as any of the other forms of testimonial compulsion which are constitutionally prohibited.

In the case of STATE v. BERG, 76 Ariz. 96, 259 P.2d 261 (1953), which has been cited by both counsel, our Supreme Court in commenting upon Article 2, section 10 of the Arizona State Constitution which provides that:

> "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.";

discussed at length the scope of the evidence intended to be embraced in this constitutional immunity and held that such protection was limited primarily to testimonial

which is prohibited by the Fifth Amendment of the Federal Constitution and a similar provision of the Arizona State Constitution.

This Court has no doubt that the use of such process would have the same effect as any of the other forms of testimonial compulsion which are constitutionally prohibited.

In the case of STATE v. BERG, 78 Ariz. 95, 459 P.2d 761 (1957), which has been cited by both counsel, our Supreme Court in commenting upon Article 2, section 10 of the Arizona State Constitution which provides that:

"No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

compulsion, i.e., to extract from the person's own lips an admission of his guilt.

Quoting from 8 Wigmore on Evidence, § 2263 (3d ed. 1940) the Court continued and noted that:

> "'The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness.'" (Emphasis Theirs) STATE v. BERG, 76 Ariz. at 100, 259 P.2d at 264.

The Court then pointed out that § 2264 of Wigmore makes a broad application of the rule to include documents or chattels produced in court by legal process.

> "'Production or Inspection of Documents and Chattels. 1. It follows that the production of documents or chattels by a person (whether ordinary witness or party witness) in response to a subpoena, or a motion to order production, or to other form of process treating him as a witness (i.e., as a person appearing before the tribunal to furnish testimony on his moral responsibility for truth-telling), may be refused under the protection of the privilege; and this is universally conceded. For though

> the disclosure thus sought be not oral in form, and though the documents or chattels be already in existence and not desired to be first written and created by testimonial act or utterance of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the authenticity or origin of the articles produced.'" STATE v. BERG, 76 Ariz. at 100, 259 P.2d at 264.

The most recent revision of Wigmore specifically states that a testimonial compulsion is implicit in the production of a document or chattel pursuant to court order, while the third edition merely noted that no line could be drawn between production of evidence and an oral disclosure.

> "It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort--authenticating or vouching for pre-existing chattels -- are not typical of the

> sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection. 8 Wigmore on Evidence §2264 (McNaughten rev. 1961). (Emphasis added.)

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers SCHMERBER v. CALIFORNIA, 384 U.S. 757 (1966). And in the case of BOYD v. UNITED STATES, 116 U.S. 616, 630 (1886), which considered the Fourth and Fifth Amendments as running "almost into each other," it was held that:

> " * * * any forcible and compulsory extortion of a man's own testimony or of his private papers to be used in evidence to convict him of crime or to forfeit his goods, is within the condemnation of (those amendments) * * *."

The facts upon which this special

action was founded most certainly fall within the shadow cast by the authorities cited above. There was a disclosure sought from the petitioner by use of legal process (subpoena duces tecum) against him as a witness which was followed by a refusal to produce based upon the claim of a Fifth Amendment privilege.

Our disposition of this special action would be incomplete in the absence of a determination as to the extent of the immunity afforded petitioner by the provisions of A.R.S. § 13-1804. The statute, in addition to a grant of immunity from criminal prosecution, prohibits the subjection of the petitioner to any "penalty or forfeiture" on the basis of the evidence produced. The question with which we are faced is what is meant by the term "penalty or forfeiture."

It has been held that the term "penalty," when used in the context of the

Fifth Amendment privilege to remain silent unless one chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence, means the imposition of any sanction which makes assertion of the privilege "costly." SPEVACK v. KLEIN, 385 U.S. 511 (1967). We are of the opinion, however, that such a broad interpretation of A.R.S. § 13-1804 would defeat the purpose of the statute. It would, in effect, prevent the use of the evidence produced in any and all subsequent proceedings, criminal or civil, which could affect and thereby prove "costly" to the petitioner.

If the meaning of the language in an act is doubtful, it should be given a construction, if possible, that will reconcile it with the general principles of the act. ODLE v. SHAMROCK DAIRY OF PHOENIX, 7 Ariz. App. 515, 441 P.2d 550 (1968). And where the language of the statute is

susceptible of several interpretations, a court will adopt that which is reasonable and avoids contradictions and absurdities. STATE BOARD OF DISPENSING OPTICIANS v. SCHWAB, 93 Ariz. 328, 380 P.2d 784 (1963).

> "In interpreting a statute a court looks to the subject of the act and the object which it intends to accomplish. When the subject matter is clearly ascertained and its general intent is determined, all words used in the act will be interpreted according to that intent. Thus, when the intent has been established, words may be modified, altered or supplied, and general words restrained and narrow words expanded so as to obviate any repugnancy or inconsistency with the general intention of the legislature." J. G. Sutherland, Statutes and Statutory Construction § 4814 (3d ed. 1943).

The general purpose of A.R.S. § 13-1804 is to enable the courts of this State to receive testimony and evidence which would ordinarily be constitutionally prohibited by the Fifth Amendment. The witness, in effect, may be compelled to exchange his privilege against self-

incrimination for a grant of immunity. Inasmuch as the immunity afforded is intended to neutralize the claim of a Fifth Amendment privilege, this Court is of the opinion that the immunity granted by A.R.S. § 13-1804 is limited to the imposition of a criminal "penalty or forfeiture" and has no effect whatsoever on civil sanctions which could be imposed subsequent to the production of the allegedly obscene film. To hold otherwise would be to characterize the immunity statute as having a purpose, namely the introduction of evidence which is ordinarily privileged, while simultaneously failing to recognize a method by which such purpose may be realized by precluding the use of such evidence in any and all subsequent proceedings.

Our decision is in accord with that reached in HEADLEY v. BARON, 228 So.2d 281 (Fla. 1969). In HEADLEY, the court interpreted the "penalty and forfeiture"

provision of the following Florida statute which provided in pertinent part that:

> " * * * no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding." Fla. Stat. § 923.29 (1965).

In discussing the limitations of immunity provisions, the Florida Supreme Court commented as follows:

> "Hence, it is said that the protection of the statutory immunity must be as broad as the constitutional privilege. Since the Constitution protects the individual against self-incrimination, the immunity granted in exchange for his testimony must in equal measure protect him from prosecution based on the testimony obtained in the bargain. Actually, an immunity statute is not constitutionally compelled to extend the amnesty beyond the criminal aspect of the matter. 8 Wigmore, Evidence §§ 2281, 2282 (McNaughten rev. 1961)." (Emphasis added.) HEADLEY v. BARON, supra at 284.

The problem with which we are faced is,

therefore, as it was in HEADLEY, one of statutory construction rather than constitutional interpretation. The Florida court construed their "penalty and forfeiture" provision in such a manner as to restrict the immunity granted to those situations in which the "penalty or forfeiture" imposed was criminal in nature.[3/]

> "The words in the statute, viz. 'penalty or forfeiture' relate to any penalty or forfeiture which might arise out of or result from a conviction for one of the five crimes named in the statute. The word 'forfeiture' is used in the statute in the same sense as the word 'fine.' The expression 'fine and forfeiture' is a familiar one

---

3/ It is interesting to note that the HEADLEY opinion specifically overrules three earlier decisions interpreting Florida's "immunity statute" in a manner which disallowed the imposition of civil sanctions as "forfeitures" prohibited by the statute. FLORIDA STATE BOARD OF ARCHITECTURE v. SEYMOUR, 62 So.2d 1 (Fla. 1952); STATE BEVERAGE DEPARTMENT OF FLORIDA v. STATE EX REL ZUCKER, 116 So.2d 640 (Fla. Dist. Ct. of App. 1959); HOTEL AND RESTAURANT COMMISSION v. ZUCKER, 116 So.2d 642 (Fla. Dist. Ct. of App. 1959).

> in criminal law and relates to punishment for the violation of a penal statute."
> Id. at 286.

We agree with this analysis and believe that it is directly applicable to the case which is presently before us. Accordingly, it is the holding of this Court that the immunity granted to petitioner by the provisions of A.R.S. § 13-1804 in the form of protection from a "penalty or forfeiture" is restricted to those penalties or forfeitures which are criminal in nature. We hold that should the City of Phoenix proceed with the civil action and secure an injunction in relation to <u>future</u> showings of the film in question, the injunction would not constitute a "penalty or forfeiture" for past acts but would be a prohibition against future similar acts.

Inasmuch as the respondent court ruled that the provisions of the Fifth Amendment and the privilege against self-

incrimination did not apply to the petitioner under the circumstances of the case, this Court must hold that such a ruling constituted a failure to perform a duty required by law as to which he had no discretion, i.e., honor the petitioner's privilege against self-incrimination. This holding does not preclude our determination that The Honorable Rufus C. Coulter, Jr., Judge of the Respondent Superior Court, was unquestionably correct in compelling the production of the film in question since the immunity granted in A.R.S. § 13-1804 follows as a matter of law and insulates the petitioner from any criminal prosecution on the basis of any transaction matter or thing concerning which he testifies or produces evidence. The respondent court was not proceeding in excess of its legal authority by ordering petitioner to produce the film in court over petitioner's self-incrimination objection.

We hold that the trial court erred in its ruling as to the applicability of a Fifth Amendment privilege to the case at bar. Accordingly, the petition for relief is granted insofar as it requested special action with regard to the above ruling.

The issuance of the mandate in relation to this opinion will constitute an order vacating the restraint heretofore imposed by this Court, and hereinbefore quoted, and will permit the trial court to proceed in a manner consistent with this opinion.

HENRY S. STEVENS
Presiding Judge, Department A

CONCURRING:

LEVI RAY HAIRE, Judge

EINO M. JACOBSON, Judge

APPENDIX D

Minutes and Orders of the
Superior Court, Maricopa County,
Arizona

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

20	June 29, 1971	RUFUS C. COULTER, JR.
Div.	Date	Judge or Commissioner

Wilson D. Palmer, Clerk
M. de Szendeffy Deputy

C 249138

CITY OF PHOENIX, a municipal [corporation,]

Phoenix City Attorney by:
Richard M. Hannon
and
Alan S. Max

VS

ELLWEST STEREO THEATRES, INC., an Arizona corporation, and JOHN DOE I, II and III

Richard J. Hertzberg
Robert E. Kersting

This cause comes on regularly for trial to the Court. Plaintiff is represented by Assistant Phoenix City Attorneys Richard M. Hannon and Alan S. Max; Defendants are

APPENDIX D

Minutes and Orders of the
Superior Court, Maricopa County,
Arizona

represented by counsel Richard J. Hertzberg and Robert E. Kersting; Court Reporter Diane Genemaras is present.

Both sides announce ready.

Plaintiff moves that Defendants produce the subject film.

Counsel for Defendant William A. Anderson moves to quash subpoena duces tecum served on him on the basis of the Fifth Amendment regarding the privilege against self-incrimination.

Plaintiff moves to amend the Complaint so as to reflect John Doe I as being William A. Anderson, and that this amendment be made by interlineation on the Complaint.

IT IS ORDERED granting Plaintiff's motion to amend, and the Complaint is amended by interlineation at this time.

The Court finds that the provisions of the Fifth Amendment and the privilege against self-incrimination do not apply. IT IS FURTHER ORDERED denying Defendant

Anderson's motion to quash subpoena duces tecum.

IT IS FURTHER ORDERED granting Plaintiff's motion to produce, and the Court requires that Defendant produce the film in question.

Defendant moves to continue this matter for 30 days.

IT IS FURTHER ORDERED continuing this matter for a period of 30 days to August 13, 1971 at 1:30 p.m. in this Division.

IN CHAMBERS: Assistant Phoenix City Attorney Alan S. Max and Defendants' counsel Richard J. Hertzberg are present. No Court Reporter.

Pursuant to stipulation of the parties, IT IS FURTHER ORDERED enjoining the showing of the subject film pending further Order of this Court anywhere in the State of Arizona.

IT IS FURTHER ORDERED that the subpoena duces tecum heretofore ordered

Anderson's motion to quash subpoena duces tecum.

IT IS FURTHER ORDERED granting Plaintiff's motion to produce, and the Court requires that Defendant produce the film in question.

Defendant moves to continue this matter for 30 days.

IT IS FURTHER ORDERED continuing this matter for a period of 30 days to August 13, 1971 at 1:30 p.m. in this Division.

In CHAMBERS: Assistant Phoenix City Attorney Allen B. Max and Defendants' counsel Richard D. Herlihey are present. No Court Reporter.

Pursuant to stipulation of the parties, IT IS FURTHER ORDERED enjoining the showing of the subject film pending further order of this Court anywhere in the State of Arizona.

IT IS FURTHER ORDERED that the bond posted herein heretofore ordered

remain in full force and effect pending further Order of this Court, and that the Defendants do nothing to interfere with, hinder or prevent the producing of the film at the continued hearing of this matter.

Let the Record Show that by the above Order the Court is not indicating that the Defendants will be required to show the film but only to make same available. The determination of whether or not the film will be shown will be made at a later date.

APPENDIX E

Complaint against Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CITY OF PHOENIX, a municipal corporation,	)	
Petitioner,	)	No. C249138
vs.	)	
ELLWEST STEREO THEATRES, INC., an Arizona corporation, and JOHN DOE I, II and III,	)	
Respondents.	)	

COMPLAINT AND PETITION FOR ADVERSARY HEARING TO CONSIDER QUESTION OF OBSCENITY AND APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION AND ORDER TO SHOW CAUSE.

COMES NOW the Petitioner, by and through its undersigned Attorney, and for its cause of action alleges as follows:

I.

That on the dates and times herein

mentioned the Petitioner was, and is now, a municipal corporation duly organized and existing under the law of the State of Arizona.

II.

That the Respondents own and/or are engaged in operating a business establishment, or participate in the operation or management of said business establishment, known as and located at

Ellwest Stereo Theatre
22 West Washington
Phoenix, Arizona

III.

That the true and correct names of the Respondents "Doe" are unknown to the Petitioner, and that Petitioner will move this Court for leave to amend this Petition once their true and correct names are ascertained and become pertinent.

IV.

That on or about the 26th day of May, 1971, Respondents did commercially exhibit,

mentioned the Petitioner was, and is now, a municipal corporation duly organized and existing under the law of the State of Arizona.

II.

That the Respondents own and/or are engaged in operating a business establishment, or participate in the operation or management of said business establishment, known as and located at

Ellwest Stereo Theatre
12 West Washington
Phoenix, Arizona

III.

That the true and correct names of the Respondents "Doe" are unknown to the Petitioner, and that Petitioner will move this Court for leave to amend this Petition when such true and correct names are ascertained and become pertinent.

IV.

That on or about the 15th day of May, 1971, Respondents did commercially exhibit,

or cause to be commercially exhibited, within the City of Phoenix, a motion picture, more fully described in the attached affidavit of Officer George Kinney of the Phoenix Police Department which affidavit is by this reference, incorporated herein; that your Petitioner is informed and believes and therefore alleges that said motion picture is obscene and its commercial exhibition violates § 13-532(2), Arizona Revised Statute.

V.

That there does not exist a plain, speedy and adequate remedy at law, absent an adversary hearing, to enable the Petitioner to prohibit continued violations of § 13-532(2), Arizona Revised Statutes, by the Respondents.

VI.

That there does not exist a plain, speedy and adequate remedy at law by which your Petitioner can compel Respondents to

or cause to be commercially exhibited,
within the City of Phoenix, a motion pic-
ture, more fully described in the attached
affidavit of Officer George Kinney of the
Phoenix Police Department which affidavit
is by this reference, incorporated herein;
that your Petitioner is informed and be-
lieves and therefore alleges that said
motion picture is obscene and its commer-
cial exhibition violates § 13-3713(B),
Arizona Revised Statute.

V.

That there does not exist a plain,
speedy and adequate remedy at law, absent
an adversary hearing, to enable the Peti-
tioner to prohibit continued violations
of § 13-3713(B), Arizona Revised Statute,
by the Respondents.

VI.

That there does not exist a plain,
speedy and adequate remedy at law by which
your Petitioner can compel Respondents to

refrain from removing the hereinabove described film from the jurisdiction of this Court and unless enjoined from so doing your Petitioner believes that said film will not be available at the time this matter comes before this Court for hearing; Further, Petitioner fears that unless similarly enjoined, the Respondents may destroy, alter, edit, or change said film prior to the hearing of this matter.

WHEREFORE, Petitioner prays as follows:

1. That an Order issue forth from this Court to the Respondents directing them to appear before this Court on a date and at a time certain and to then and there show cause, if any they may have, why the said motion picture should not be adjudged obscene and why a preliminary injunction should not be issued enjoining the removing of the hereinabove

refrain from removing the hereinabove described film from the jurisdiction of this Court and unless enjoined from so doing your Petitioner believes that said film will not be available at the time this matter comes before this Court for hearing; further, Petitioner fears that unless similarly enjoined, the Respondents may destroy, alter, edit, or change said film prior to the hearing of this matter.

WHEREFORE, Petitioner prays as follows:

1. That an Order issue forth from this Court to the Respondents directing them to appear before this Court on a date and at a time certain and to then and there show cause, if any they may have, why the said motion picture should not be adjudged obscene and why a preliminary injunction should not be issued enjoining the removing of the hereinabove

described film from this Court's jurisdiction, enjoining the altering, editing or changing in any way of said film and enjoining any further showing or exhibiting of said film.

2. That if said film is determined, by this Court, to be obscene, that Respondents be ordered to surrender it to the Petitioner for possible criminal prosecution; and,

3. For such other and further relief as this Court deems just and proper in the premises.

JOE R. PURCELL
City Attorney

By /s/ Alan S. Max
ALAN S. MAX
Assistant City Attorney
410 West Washington
Phoenix, Arizona 85003

described film from this Court's
jurisdiction, enjoining the alter-
ing, editing or changing in any way
of said film and enjoining any fur-
ther showing or exhibiting of said
film.

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JOE R. PURCELL, having been first duly sworn, deposes and says:

That he holds the office of CITY ATTORNEY of the City of Phoenix, a municipal corporation, the Petitioner herein; that he has read the foregoing complaint and is familiar with the contents thereof; that the matters therein stated are true of his own knowledge, except as to those matters stated on information and belief and to such matters he believes them to be true.

/s/ Joe R. Purcell
JOE R. PURCELL

SUBSCRIBED AND SWORN to before me this 8th day of June, 1971.

/s/ Elsa Christian
NOTARY PUBLIC

My commission expires:

May 13, 1972

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-801

WILLIAM ANDERSON,

Petitioner,

v.

THE CITY OF PHOENIX, a municipal corporation and RUFUS C. COULTER, JR., Judge of the Superior Court, Maricopa County, Arizona,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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This matter comes before this Court on the Petition of WILLIAM ANDERSON for a Writ of Certiorari pursuant to Rule 19,

Supreme Court Rules. The contents of that Petition with regard to the opinion below, jurisdiction, statement of the case and finality of the judgment are substantially correct and are hereby adopted by your Respondents.

Opposition to the granting of the Petition is grounded on the fact that the decision rendered by the Supreme Court of the State of Arizona is in accord with applicable decisions of this Court and while this precise issue has never been presented to this Court other decisions of this Court are supportive of the findings below.

ARGUMENT

THE COMPELLED PRODUCTION OF AN ALLEGEDLY OBSCENE MOTION PICTURE, PURSUANT TO A SUBPOENA DUCES TECUM, AT A PRIOR ADVERSARY HEARING FULLY COMPORTS WITH CONSTITUTIONAL REQUIREMENTS AND WITH THE APPLICABLE DECISIONS OF THIS COURT.

It should first be pointed out to this Court that the action initiated by

your Respondents, which is the subject of this Petition, was a civil action, in the nature of a probable cause hearing, for the determination of the issue of obscenity of a motion picture film alleged to be obscene. In the Petition filed in this cause, counsel for Petitioner Anderson has cited numerous cases for the proposition that "exercise of First Amendment rights cannot be conditioned upon payment of a price and that the assertion of one constitutional right cannot waive another".

One of the cases cited in support of the foregoing position is Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed 2d 1247 (1968). In the Simmons case this Court stated that "we find it intolerable that one constitutional right should have to be surrendered in order to assert another". That holding however, with its exclusions, readily applies to the instant case. This Court went on to

state that:

> "When a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, this testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." 390 U.S. at page 394, 19 L.Ed 2d at page 1259.

The hearing at which production of the film was compelled by a subpoena duces tecum can certainly be viewed as either a probable cause hearing or as being similar to a hearing upon a motion to suppress. This being the case, testimony of the Petitioner would be excluded and no prejudice to him would attach.

The procedure used in the instant case has evolved due to the decisions of the Courts of Appeal both of the Ninth Circuit and the State of Arizona compelling a Prior Adversary Hearing before seizure of an allegedly obscene motion picture. For this Court to preclude com-

pelled production of the film at such a hearing thwarts the entire thrust and purpose of the hearing and gives carte blanche to an individual commercially exhibiting pornography to continue in his activities.

Additionally, the case Katz v. United States, 389 U.S. 347, 88 S.Ct 507, 19 L. Ed 2d 579 (1967) cited by the Ninth Circuit Court of Appeals in United States v. Jackson, 448 F2d 963 (1971) and by the Arizona Supreme Court and State v. Fasler, _____ Ariz. _____, 503 P2d 803 (1972) while dealing with the Fourth Amendment offers some guidance in the instant matter. In the Katz case, supra, this Court stated:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject for Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

(Citations omitted) 389 U.S. at page 351-2; 19 L. Ed 2d at page 582.

It is inconceivable that an individual who has shown a motion picture openly, notoriously and publicly to any one with the price of admission can then claim that these are private and personal materials protected by the Fifth Amendment to the United States Constitution. It is ludicrous to believe that a court cannot compel the production and showing of a motion picture film when, at the same time, the film is commercially displayed in a public theater and the judge could see it if he went to the theater and paid the admission price. If for no other reason than to maintain the dignity of the court, approval of the procedure used here is required.

Additionally, four circuits of the United States Court of Appeals have held that a motion picture must be produced

for purposes of prosecution. While the opinions of these courts have not indicated whether a Fifth Amendment objection was interposed there vitality and validity can not be questioned.

In the case of Tyrone, Inc. v. Wilkinson, (4th Cir., 1969) 410 F2d 639, cert denied 396 U.S. 958, 90 S.Ct. 478, 24 L.Ed 2d 449, the Court stated:

> " . . . . we will require the theatre to make available a copy of (the motion picture in question) for the preparation and trial of the criminal cases. Metzger v. Pearcy, 393 F2d 202, 204 (7th Cir., 1968)." (At Pp 640-1; additional material added.)

The Tyrone court went on to say that in compelling a prior adversary hearing before seizure of the motion picture

> "Metzger, included a requirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney upon request, a copy of the movie for reasonable use in the preparation and trial of the charge now pending in the State court." (At page 641).

The Second Circuit Court of Appeals has specifically authorized the procedure which was utilized by the Respondent City of Phoenix in this case. The Court stated:

> "The Appellants (the prosecuting authority) contend that a print of the motion picture is needed for purposes of prosecution. There are a number of ways in which this can be accomplished without seizure of the film. The court can direct that a print be made available to the prosecution; a subpoena duces tecum can be used."
>
> "Finally it is suggested that unless the police or other local authorities have actual possession of the film pending the required adversary proceeding, the distributor may take advantage of the delay, for example, by shipping the film out of the jurisdiction or by cutting out the offending scenes. If there is a real threat of such activity it can be controlled by an ex parte restraining order." Bethview Amusement Corp. v. Cahn, (2nd Cir., 1969) 416 F2d 410, cert. denied 392 U.S. 920, 90 S.Ct. 929 (1970). (Additional material added.)

See also: United States v. Alexander, (8th Cir., 1970) 428 F2d 1169, 1176.

It should be noted that the above decisions compel the production of the film not only for the adversary hearing but also compel its production for preparation and use in the trial of the criminal charges which may be brought following the adversary hearing.

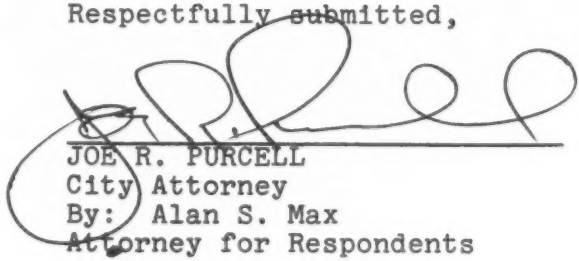
Petitioner has brought before this Court a parade of the horribles carrying the limited procedural method here used to extremes certainly not contemplated by Respondents and which could not, and should not, be condoned by this Court. However, since the courts have created certain peculiar procedural requirements with regard to obscenity prosecutions, the procedure here used fully comports with those requirements and the protection of the Petitioner's rights so as to grant him full constitutional protection while not ignoring the laws obligation to the community with regard

to effective criminal prosecution.

CONCLUSION

Based upon the foregoing it is clear that the decision of the Supreme Court of the State of Arizona in Anderson v. Coulter, _____Ariz. _____, 499 P.2d 103 (1972) fully comports with constitutional requirements and the applicable decisions of this Court and therefore this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



JOE R. PURCELL
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